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LECTURE

PHILADELPHIA LAWYER: A CAUTIONARY TALE†

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I propose to talk with you today about a lawyer of notable and diverse accomplishment. He was a leading courtroom lawyer—one of the very best. During his early years at the bar he taught law—and in the twilight of his career he served as dean—at one of the great law schools. And in mid-career—at the peak of his lawyerly fame—he was named to the bench. He was a Philadelphia lawyer. Indeed, he may be perceived as the quintessential Philadelphia lawyer. And yet a faithful account of that portion of his career which would seem to

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have been crowned with greenest laurels—his years on the highest of high courts—turns out to be a cautionary tale: a cautionary tale which, I respectfully suggest, those who now sit on that highest court would be well advised to take into account.

I.

As, doubtless, many of you have already surmised, the Philadelphia lawyer about whom I will speak is Owen Josephus Roberts, the person honored by this Lectureship.

Roberts was born in Germantown in 1875. At the age of sixteen he matriculated at the University of Pennsylvania, where he was to spend four years as an undergraduate and three years studying law. At the College—where he majored in Greek, writing his senior essay on “The Agamemnon Myth as Treated by the Attic Dramatists”—Roberts achieved high academic honors. He continued this pattern at the Law School, where he was elected to the student editorial board of the *American Law Register*, soon to become the *University of Pennsylvania Law Review*, and where he won the Sharswood essay prize. Roberts was so highly regarded by the law faculty that, after graduating and commencing practice in 1898, he was appointed to a teaching fellowship at the Law School. This appointment marked the beginning of an adjunct professorial role that spanned Roberts’s early and middle years as a practicing lawyer. These were years in which, while teaching property at Penn, Roberts was learning the trade of a litigator. In 1919, twenty-one years after graduating from the Law School, Roberts found that the demands of his growing practice precluded further teaching, and he resigned his adjunct professorship. But, as we shall see, the time was to come when the Roberts-Penn connection would be reestablished.

Throughout the 1920s Roberts prospered and gained national recognition. In 1924, President Coolidge appointed Roberts one of two Special Counsel to investigate—and, if feasible, bring about the cancellation of—what appeared to be corrupt leases to private oil interests of large reserves of government oil stored for the Navy; the suspect leases, entered into during the Harding administration, were the transactions which, collectively, came to be known as “Teapot Dome.”¹ In 1930, President Hoover, with the advice and unanimous

¹ Roberts’s fellow Special Counsel was Atlee Pomerene, a former senator from Ohio. The investigation focused on 1) the lease of the Elk Hill Reserves in California and the Pearl Harbor Naval Fuel Oil Storage Project, and 2) the lease of the Teapot

consent of the Senate, appointed Roberts an Associate Justice of the Supreme Court.²

The litigator-turned-judge³ was to serve on the Court for fifteen years—through the balance of Hoover's presidency and the entirety of the presidency of Franklin Roosevelt. For the Court—and for the country—they were years of challenge and change, of Depression and war. In just a few moments I will undertake to remind you of certain

Dome oil reserves in Wyoming. The leases had been authorized by Albert Fall, President Harding's Secretary of the Interior. Fall was convicted of accepting a bribe. Litigation directed by Roberts and Pomerene resulted in cancellation of the leases. See Robert T. McCracken, *Owen J. Roberts—Master Advocate*, 104 U. PA. L. REV. 322, 326-29 (1955); see also *Mammoth Oil Co. v. United States*, 275 U.S. 13 (1927).

² Roberts was appointed to fill the vacancy created by the death of Justice Edward Terry Sanford. Hoover had first nominated Judge John J. Parker of the Fourth Circuit, but Parker, whose nomination was opposed by the American Federation of Labor and by the NAACP, failed of Senate confirmation by one vote. The senators who took the lead in derailing the Parker nomination were William E. Borah and George W. Norris. A freshman senator who followed the Borah-Norris lead was Hugo L. Black. Black later observed of Parker—who remained on the Fourth Circuit, serving with considerable distinction, for almost thirty years—"John Parker was a better Judge after the hearing than before it." ROGER K. NEWMAN, *HUGO BLACK: A BIOGRAPHY* 135 (1994).

³ In changing roles from lawyer to judge, Roberts, a person of instinctive courtesies, evidently maintained a strong empathy for the practicing lawyers who appeared before him. Good evidence of this is found in Francis Biddle's account of his first argument in the Supreme Court as Solicitor General in 1940. Biddle was scheduled to argue two related cases. On the day before the argument he felt distinctly unwell, but he decided that he did not want to commence his service as Solicitor General by asking the Court for a continuance:

I decided to take a chance, swallowed a Benzedrine pill early in the morning of the argument, and turned up in Court a bit shaky.

The cases were to be argued separately as they involved different claims. As we had lost both in the courts below, I opened for the United States. I got through the first pretty well. But when the second was called, and I rose to open, everything went black, and my memory became a blank filled only with a sense of shame. I hesitated. Justice Owen Roberts, a Philadelphian whom I had known well before he went on the bench and greatly liked, sensing the situation, leaned forward. "Mr. Solicitor General," he said, "I have read the briefs, but I am not sure that I have the facts accurately. Will you correct me if I am wrong? It would appear that . . ." and he proceeded to state the facts in his admirably lucid style. The blank vanished, the case came back, shame evaporated, the law of the case was easy to present. Roberts did not have to prompt me again, but the faint trace of a friendly smile was there, as if he were saying "It's all right, Francis, it's all right . . ." Many years later I taxed him with it. He said yes, you did look pretty white, and you kept mopping your forehead. He didn't think the brethren had noticed particularly, though he did not remember any very favorable comments on the first appearance of the new Solicitor . . . How could you help loving a man who did that sort of thing for you?

FRANCIS BIDDLE, IN *BRIEF AUTHORITY* 100 (1962).

of the major themes that affected the Court. Suffice it to note here that what began as the highest honor that could come to a member of the bar was to become an increasingly difficult and unrewarding passage. In Roberts's last years on the Court he was the senior Associate Justice—and a marginal figure. When he left the Court in 1945 his colleagues could not even muster up the minimum collective courtesy of sending the customary letter of appreciation and farewell.

Leaving the Court did not mean quitting public service. Quite the contrary. Leaving the Court permitted Roberts to lend his name and his energies to a variety of significant civic endeavors. But Roberts declined President Truman's request that he take on a further judicial chore—serving as the United States member of the Court at Nuremberg, the four-power tribunal that tried the German war criminals. When Roberts said "no," Truman appointed Francis Biddle, another eminent Philadelphia lawyer.⁴

Fortunately, Roberts said "yes" when, in 1948, his alma mater asked him to return to the Penn faculty after an absence of twenty-nine years. Roberts's academic reincarnation was full-time, as dean of the Law School, to fill the post unexpectedly vacated by Earl Harrison. Roberts was dean for three years. He worked hard and effectively to increase faculty salaries, raise scholarship funds, and strengthen the Biddle Law Library.⁵ But Dean Roberts's best and most enduring contribution to this School and this University—and, arguably, to the City and the Commonwealth as well—was to persuade a young alumnus of this Law School who had begun teaching law out in the heartland (at the University of Iowa) to return to Penn as a member of the faculty: Leo Levin. It should be acknowledged, however, that Roberts's deanship was marked by two protocols which have not turned out to be lasting ingredients of his academic legacy. Thus—and this I state to my certain knowledge—not all of Roberts's successors as dean have insisted, as Roberts did, that the dean receive no salary. And not all faculty members—nor, indeed, all deans—have seen the wisdom of the Roberts principle of law school governance which, so it is reported, contemplated "that the relationship of the members of a law

⁴ Biddle and Roberts were good friends. See *supra* note 3.

Appointed to serve as alternate United States member of the Nuremberg Court was Judge John J. Parker of the Fourth Circuit. It had been Parker whom Hoover originally nominated in 1930 to fill the Supreme Court vacancy occasioned by the death of Justice Sandford; and, when Parker failed to receive Senate confirmation, Hoover nominated Roberts. See *supra* note 2.

⁵ See Edwin R. Keedy, *Owen J. Roberts and the Law School*, 104 U. PA. L. REV. 318, 320 (1955).

faculty with each other is similar to that of the judges of an appellate court, with the dean corresponding to the chief justice."⁶

In 1951, at the age of seventy-six, Roberts retired from the deanship. A year later he accepted the presidency of the American Philosophical Society; Roberts was the twenty-fourth president in a line that stretches back to Jefferson and Franklin. In May of 1955, two weeks after his eightieth birthday, Roberts died.⁷

II.

"The last thing that Justice Roberts would want is that this Lectureship should be turned into a laudatory exercise. Nothing would that exquisitely modest man deplore more."⁸ So said Felix Frankfurter on March 20, 1957, when he delivered the first lecture in this series which is now in its fortieth year. Frankfurter devoted his lecture to the question of whether Supreme Court Justices need to have prior judicial experience—a question he answered in the negative, and fortunately so, given that neither Frankfurter nor Roberts had been a judge before becoming a Justice.⁹ But, true to his word, Frank-

⁶ *Id.*

⁷ The December 1955 issue of the *University of Pennsylvania Law Review* was dedicated to Roberts. The lead essay was by Justice Frankfurter. See Felix Frankfurter, *Mr. Justice Roberts*, 104 U. PA. L. REV. 311 (1955). The Justice's eloquent tribute to his late colleague is discussed *infra* note 25. The one essay in the symposium that discussed Roberts's contribution as a Justice was by Erwin N. Griswold, *Owen J. Roberts as a Judge*, 104 U. PA. L. REV. 332 (1955). Other essays canvassed Roberts's career as a lawyer, his links with the University of Pennsylvania Law School, and his wide array of public activities. The final essay was a profile entitled *Owen J. Roberts—The Man*, 104 U. PA. L. REV. 372 (1955), by Roberts's Philadelphia colleague and mentor, George Wharton Pepper. The architect of this memorial issue of the *Law Review* was Editor-in-Chief Curtis Reitz.

Apart from the memorial issue of the *Law Review* there have been singularly few published writings about Roberts. There is an informative essay by David Burner, *Owen J. Roberts*, in 3 *THE JUSTICES OF THE UNITED STATES SUPREME COURT 1789-1969*, at 2253 (Leon Friedman & Fred L. Israel eds., 1969). There is, however, no full-scale biography. The most penetrating examination of Roberts's role on the Court is provided by Richard D. Friedman in his remarkable article, *Switching Time and Other Thought Experiments: The Hughes Court and Constitutional Transformation*, 142 U. PA. L. REV. 1891, 1939-53 (1994).

⁸ Felix Frankfurter, *The Supreme Court in the Mirror of Justices*, 105 U. PA. L. REV. 781, 781 (1957).

⁹ Frankfurter noted that, as of the time he presented his lecture, there had been ninety Supreme Court Justices. "[O]mitting contemporary and relatively recent occupants of the Court," *id.* at 782, Frankfurter reduced to seventy-five the number of Justices to be ranked. Frankfurter listed twelve Justices—Marshall, William Johnson, Story, Taney, Miller, Field, Bradley, Edward D. White "(despite his question-begging verbosity)," Holmes, Hughes, Brandeis and Cardozo—as to whose distinction he

frutger did not use the occasion to pay extravagant tribute to his late colleague and friend, let alone to undertake an assessment of Roberts's judicial work product. And the lecturers who have followed Frankfurter have in the main been bound by his dictum that lauding the honoree is not what this Lectureship is all about. Of course a few of the lecturers have said gracious words about Roberts, but none has sought to parse even a fraction of the 353 opinions—282 for the Court—written by Roberts in his fifteen judicial years.¹⁰

Today I will talk about some of Roberts's work as a judge. But it is not my purpose to examine Roberts's cases in detail. What I want to do is briefly to recall a major chapter—indeed, a decisive chapter—in our constitutional history which has now largely receded from view. It is a chapter that was turmoil-filled, and in which Roberts played a central role. From the perspective of the Court as an institution, that difficult chapter had a reasonably happy ending; but it was not a happy ending for Roberts. In undertaking to refresh your recollection of these matters, I will point to certain aspects of Roberts's judicial balance sheet. But I will do so not for the purpose of reconstructing—or deconstructing—Roberts. I will do so because I think a backward glance may add perspective—for better or for worse—to an assessment of certain issues of substantial import confronting the Court to-

thought there was "a consensus of informed judgment." *Id.* at 783. Of the consensus twelve, only five had served as judges before being appointed to the Court. (The five were Johnson, Field, White, Holmes and Cardozo.) Frankfurter went on to explain that in his view four other Justices—Curtis, Campbell, Matthews and Moody—deserved to be ranked with the twelve, making a total of "sixteen Justices whom I deem preeminent." *Id.* at 784. Of the additional four, only Matthews had had prior judicial experience. Thus, ten of Frankfurter's sixteen "preeminent" Justices were innocent of judging before coming to the Court.

If one were to attempt a partial updating of Frankfurter's rankings by including the fifteen Justices he excluded (because they were, in 1957 when Frankfurter presented his lecture, "contemporary and relatively recent occupants of the Court") there are at least four additional Justices as to whom, I trust, there can be said to be "a consensus of informed judgment" that they were "preeminent." Those four are Stone, Black, Frankfurter and Brennan. Brennan had seven years of state judicial experience, both trial and appellate, before coming to the Court; Black, at the age of twenty-five, was appointed to the Birmingham Police Court—a part-time judicial post—and served for a year-and-a-half; Stone had never been a judge; nor had Frankfurter, but Frankfurter came to the Court as the most knowledgeable student of the institution since the First Congress, and then the Jay, Ellsworth and Marshall Courts, breathed life into Article III. (There are four other mid-1950s Justices whom many—albeit perhaps not a consensus—would dub "preeminent": Chief Justice Warren and Justices Douglas, Jackson and Harlan. Of these only Harlan had been a judge before becoming a Justice.)

¹⁰ For assessments of some aspects of Roberts's judicial work-product, see the 1955 essay by Dean Griswold and the 1994 article by Professor Friedman, *supra* note 7.

day, half a century after Roberts resigned his commission.

III.

When Roberts came to the Court in 1930, he was the second of two Justices appointed by Hoover in the same year. Roberts's companion appointee was not a newcomer to the Court. He was Charles Evans Hughes, returning as Chief Justice to the Court on which he had served as an Associate Justice two decades before. Of the seven Justices whom Hughes and Roberts joined, the two eldest—Holmes at eighty-nine and Brandeis at seventy-four—were already the stuff of legend. Proceeding from very different philosophic premises—Holmes was a sceptic and Brandeis a reformer—they had arrived at very similar jurisprudential positions: From a constitutional perspective, they tended to be tolerant of governmental measures that imposed restraints on economic interactions, but intolerant of restraints on the marketplace of ideas. Harlan Fiske Stone—a former dean of the Columbia Law School and also a former Attorney General—was in close accord with Holmes and Brandeis. When, in 1932, Holmes retired and was succeeded by another legendary figure, Benjamin Cardozo, the new Justice quickly aligned himself with Brandeis and Stone. Arrayed against the three liberal Justices were the four profoundly conservative Justices known as the Four Horsemen—Willis Van Devanter, James Clark McReynolds (who was also a bigot—when Cardozo was appointed, McReynolds didn't take kindly to there being yet another Jew on the Court), George Sutherland and Pierce Butler. The Four Horsemen tended to translate their laissez-faire principles into constitutional imperatives, taking the most narrowly astringent view of congressional power to regulate interstate commerce and to tax and spend for the general welfare, and finding in the Fourteenth Amendment's Due Process Clause a strong bulwark against state laws regulating local economic activity.

Given this division among their colleagues, Hughes and Roberts could by their decisive votes shape the constitutional capacity of the nation and the states to meet the Depression. At first they gave signs of siding with the liberal Justices, Roberts making a particularly valuable contribution in *Nebbia v. New York*,¹¹ which upheld a New York statute regulating the price of milk. But midway through FDR's first term the judicial tide began to turn against the New Deal.

In 1935 and 1936 the Court dealt the New Deal many hard blows.

¹¹ 291 U.S. 502 (1934).

I will focus on only a few. First I will refer to two cases in which the Court struck down statutes bottomed on Congress's constitutional power to "regulate Commerce . . . among the several States"—i.e., interstate commerce. The first statute, invalidated in *Railroad Retirement Board v. Alton Railroad Co.*,¹² was a congressional directive to the railroads to establish a pension system. Railroads had been the subject of detailed congressional supervision for decades, but Roberts and the Four Horsemen could see no merit in the notion that giving structure to the retirement aspect of the employment relationship would promote the morale and hence the efficiency of railroad workers. The opinion, written by Roberts, found the statute's purposes to be "really and essentially related solely to the social welfare of the worker, and therefore remote from any regulation of commerce."¹³ Hughes filed a dissenting opinion, which was joined by Brandeis, Stone and Cardozo. The second statute, invalidated in *Carter v. Carter Coal Co.*,¹⁴ undertook to regulate prices and conditions of labor in the bituminous coal mines. In an opinion by Sutherland, joined by his three fellow Horsemen and also by Roberts, conditions of labor in the mines were held to be outside the regulatory authority of Congress, because *mining* coal, as distinct from *marketing* coal after it emerged from the mines, was deemed to have only an "indirect" impact on interstate commerce. Hughes concurred in part. Cardozo, joined by Brandeis and Stone, dissented.

In addition to curtailing the commerce power, the Court placed narrow limits on Congress's other principal power over the economy—the power to tax and spend. In *United States v. Butler*,¹⁵ in 1936, Roberts, joined by Hughes and the Four Horsemen, overturned the first Agricultural Adjustment Act, a statute creating financial inducements for farmers to reduce the production of crops that were in ruinous oversupply. Stone, joined by Brandeis and Cardozo, dissented.

Finally, in the *Tipaldo* case,¹⁶ also in 1936, in an opinion written by Butler and joined by the three other Horsemen plus Roberts, the Court invalidated a New York State statute setting minimum wages for women. Hughes and Stone filed dissenting opinions which were joined by Brandeis and Cardozo. Taken together, *Railroad Retirement Board*, *Carter Coal*, *Butler* and *Tipaldo* raised serious questions about

¹² 295 U.S. 330 (1935).

¹³ *Id.* at 368.

¹⁴ 298 U.S. 238 (1936).

¹⁵ 297 U.S. 1 (1936).

¹⁶ *Morehead v. New York ex rel. Tipaldo*, 298 U.S. 587 (1936).

whether either the United States or the individual states had governmental power sufficient to revive a stricken economy.

On Election Day 1936—just sixty years ago last week—Roosevelt was reelected by the greatest Electoral College majority in the history of the Republic. Three months later, in February of 1937, the President, smarting under the Supreme Court's repudiation of important New Deal initiatives, proposed his gravely wrong-headed remedy—legislation to authorize packing the Court through the appointment of a new Justice, up to a ceiling of fifteen, for every Justice remaining in service after reaching the age of seventy. One supposed rationale for FDR's proposal was that the elderly Justices could not keep up with their work—a transparently disingenuous proposition, since the Court was up-to-date in disposing of the cases on its docket.

A month later, on March 29, 1937, in *West Coast Hotel Co. v. Parrish*,¹⁷ the Court, speaking through Hughes, *sustained* a Washington State minimum-wage-for-women statute. The vote was five-to-four. The difference in result from *Tipaldo*, decided only nine months before, was that Roberts had changed sides. The possibility that a new constitutional jurisprudence was in the process of taking hold was confirmed, less than a month later, when the Court, in a series of opinions—two by Hughes¹⁸ and two by Roberts¹⁹—sustained the National Labor Relations Act. The key opinion was that of Hughes in *NLRB v. Jones & Laughlin Steel Corp.*,²⁰ which explained why stabilizing labor relations in one of the major steel companies was an objective within the reach of the commerce power. It appeared that the Court had at last adopted an expansive view of the Commerce Clause not readily reconcilable with the minimalist view adhered to only a year before in *Carter Coal*.

Later in the spring of 1937, the Court, in two companion cases, upheld the unemployment compensation and old-age benefits portions of the Social Security Act²¹—provisions that the narrow view of the taxing and spending power announced in the *Butler* case a year before had seemed to render constitutionally vulnerable. In both cases, Cardozo wrote for the Court; in both cases, Roberts and

¹⁷ 300 U.S. 379 (1937).

¹⁸ See *NLRB v. Friedman-Harry Marks Clothing Co.*, 301 U.S. 58 (1937); *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937).

¹⁹ See *Washington, Va. & Md. Coach Co. v. NLRB*, 301 U.S. 142 (1937); *Associated Press v. NLRB*, 301 U.S. 103 (1937).

²⁰ 301 U.S. 1 (1937).

²¹ See *Helvering v. Davis*, 301 U.S. 619 (1937); *Steward Machine Co. v. Davis*, 301 U.S. 548 (1937).

Hughes were part of the majority.²² In June, the senior member of the Four Horsemen, Van Devanter, retired. In the same month the Senate Judiciary Committee rendered a negative report on the Court-packing plan, and a month later the plan was dead. In August, Roosevelt nominated and the Senate confirmed a successor to Van Devanter—Senator Hugo L. Black, the New Deal's most effective legislative champion. It was Roosevelt's first—and, as it turned out, his most significant—Supreme Court appointment. With Black's accession, the Court's change of direction was confirmed.

Almost sixty years were to go by before the Court again ventured to strike down a federal statute bottomed on one or another aspect of Congress's plenary power over the economy.²³ With the demise of the Court-packing plan, the Court's authority appeared to be substantially restored. But some dents in the Court's armor remained. Most damaging had been the sudden, and largely unexplained, shifts of position by Roberts—and, but to a lesser extent, Hughes—between 1936 and 1937. It took a long time for the Court fully to recover from what was described, with splendid malice, as "The Switch In Time That Saved Nine." Roberts's own reputation suffered so substantially that in 1945, some months after he left the Court, Roberts acceded to Frankfurter's request that Roberts prepare a memorandum demonstrating that his change in position from *Tipaldo* to *Parrish* was not simply a tactical retreat in the face of FDR's Court-packing plan. Roberts's memorandum undertook to establish two facts. The *first* fact was that Roberts's votes in *Tipaldo* and *Parrish* were not inconsistent, since counsel supporting the validity of the *Parrish* statute had presented an argument, which Roberts found decisive, not presented by counsel in *Tipaldo*.²⁴ The *second* fact was that Roberts cast his *Parrish* vote, in conference, *before*, not *after*, the President unveiled the

²² In *Steward*, the unemployment compensation case, dissenting opinions were filed by McReynolds, Sutherland (joined by Van Devanter) and Butler. In *Helvering v. Davis*, the old-age benefits case, only McReynolds and Butler dissented.

²³ One qualification of this sweeping statement is in order. In 1976 the Court, in *National League of Cities v. Usery*, 426 U.S. 833 (1976), held that Congress's 1974 decision to extend coverage of the federal wages and hours legislation to state and municipal employees invaded the sovereignty of the states. This anomalous decision was overruled nine years later. See *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985).

²⁴ Counsel for the state in *Tipaldo* had sought to distinguish, but had not asked the Court to overrule, the Court's 1923 decision in *Adkins v. Children's Hospital*, 261 U.S. 525 (1923), a decision Roberts thought could not be distinguished, and hence found controlling; by contrast, counsel for the state in *Parrish* had argued that *Adkins* should be overruled—a course of action that Roberts, joining Hughes, Brandeis, Stone and Cardozo, was prepared to pursue.

Court-packing plan.²⁵ Frankfurter disclosed the Roberts memorandum in the article he contributed to the memorial issue of the *University of Pennsylvania Law Review*, published in December of 1955, following Roberts's death in May. One can sense how grievously Roberts's later years on the Court must have been shadowed by the "Switch In Time" calumny when one thinks about the loss of dignity the Justice must have felt as he drafted that exculpatory memorandum.

IV.

The Court's opinion in *Jones & Laughlin*, taken together with several Commerce Clause opinions in the next half-dozen years, seemed to insure that Congress could deploy its power over interstate commerce without fear of judicial impediment. The cases appeared to hold that, provided a rational basis for Congress's action could be judicially discerned, a statute governing goods distributed in the national marketplace, or governing transactions involving such goods, would be sustained as a valid exercise of the commerce power.

²⁵ The Roberts memorandum is set forth in Frankfurter, *supra* note 7, at 314-15. Frankfurter concluded his tribute to his friend with the following words:

Owen J. Roberts contributed his good and honest share to that coral-reef fabric which is law. He was content to let history ascertain, if it would, what his share was. But only one who had the good fortune to work for years beside him, day by day, is enabled to say that no man ever served on the Supreme Court with more scrupulous regard for its moral demands than Mr. Justice Roberts.

Id. at 317.

In 1994, Michael Ariens published in the *Harvard Law Review* an article advancing the astonishing notion—not, to be sure, as a certainty, but as a distinct possibility—that the Roberts memorandum was not genuine but was actually a Frankfurter construct. See Michael Ariens, *A Thrice-Told Tale, or Felix the Cat*, 107 HARV. L. REV. 620 (1994). In the pages of the *University of Pennsylvania Law Review*, Professor Friedman has recently demolished Professor Ariens's curious hypothesis. See Richard D. Friedman, *A Reaffirmation: The Authenticity of the Roberts Memorandum or Felix the Non-Forger*, 142 U. PA. L. REV. 1985 (1994). Particular note should be taken of Professor Friedman's footnote six, *id.* at 1986, in which there is excerpted a 1994 exchange of letters between Bennett Boskey and Dean Griswold in which those two immensely knowledgeable observers of the Court—who were intimates of many of the Justices (Frankfurter among them) for well over half-a-century—agreed that the Ariens innuendo was the height of absurdity.

It also should be pointed out that Dean Griswold, in his essay in the December 1955 issue of the *University of Pennsylvania Law Review*, was able to reconstruct the *Ti-paldo-Parrish* scenario without the benefit of access to the Roberts memorandum. See Griswold, *supra* note 7, at 340-44. (See the asterisked editorial note, *id.* at 340, in which the editors of Volume 104 attest to the fact that Griswold "did not have available to him" the Roberts memorandum adduced by Frankfurter.)

So matters stood for almost six decades.²⁶ But in April of last year, in *United States v. Lopez*,²⁷ the Court invalidated a federal statute making it a crime to possess a gun within one thousand feet of a school. The awkwardly drafted statute did not contain an ingredient of interstate transportation—an ingredient conventional, but by no means uniformly present, in regulatory statutes of this kind—under which the government would have to prove that on some occasion before it was taken to school the prohibited gun traveled across state lines. The absence of such an ingredient, together with congressional silence as to the statute's constitutional rationale, led the majority—Chief Justice Rehnquist, who wrote the principal opinion, and Justices O'Connor, Scalia, Kennedy and Thomas—to conclude that the statute outstripped the commerce power. The principal dissenting opinion was written by Justice Breyer, and was joined by Justices Stevens, Souter and Ginsburg. Justice Breyer's dissent persuasively established that, whether or not Congress had bothered to articulate a rationale for the statute, Congress could have reasonably felt that the United States has a strong economic need to rid schools of guns: guns in schools undermine the educational process, and children who do not learn will not be productive members of a society whose place in the competitive world market is increasingly at risk.

Justice Souter, in a separate dissent, gave historical perspective to his misgivings: "[I]t seems fair to ask whether the step taken by the Court today does anything but portend a return to the untenable jurisprudence from which the Court extricated itself almost 60 years ago. The answer is not reassuring."²⁸

Since the *Lopez* decision last year, the Court has had no further occasion to opine on the scope of Congress's commerce power. But this year the Court took a significant step to limit Congress's remedial authority to implement that power. In *Seminole Tribe v. Florida*,²⁹ the Court held invalid a provision of the Indian Gaming Regulatory Act, enacted in 1988. In that statute Congress, in the exercise of its authority under the Constitution to "regulate commerce . . . with the Indian Tribes" (a constitutional twin to Congress's authority to regulate interstate commerce), formulated procedures under which a

²⁶ But see *supra* note 23.

²⁷ 115 S. Ct. 1624 (1995).

I have discussed *Lopez* in *Foreword*, 94 MICH. L. REV. 533 (1995), and in *Perspectives on a Divided Court*, 25 CAP. U. L. REV. 285 (1996).

²⁸ *Lopez*, 115 S. Ct. at 1654 (Souter, J., dissenting).

²⁹ 116 S. Ct. 1114 (1996).

tribe wishing to launch a gaming facility—i.e., a casino or similar establishment—can undertake to negotiate what is called a “Tribal-State compact” with the state in which the facility is to be located. The statute provides that a tribe which feels that a state is not negotiating in good faith may ask a federal court for an order directing the state to carry out its duty to negotiate. Statutory provisions authorizing private litigants to sue states for years have been a familiar part of federal legislation enacted to enforce the liberty, equality and due process guarantees of the Fourteenth Amendment. But the Court in *Seminole Tribe* held that under the Indian Commerce Clause—which the Court construed to be congruent with the Interstate Commerce Clause in this respect—Congress lacks power to authorize private suits against a state. To permit such suits would, according to the Court, undermine the sovereign immunity of the several states.

Because of the time constraints imposed by the lecture format you are spared an exegesis of the three *Seminole Tribe* opinions—one for the Court and two dissents—which will take up one-hundred and fifty pages in the *U.S. Reports*. But, without engaging in such an exegesis, I would note two things. First, given that to enforce the Fourteenth Amendment Congress can authorize private suits against states, it is hard to understand what important principle of federalism would be sacrificed if states were to be defendants in private suits arising under the Commerce Clause. Second, it should not pass unobserved that the Court’s division in *Seminole Tribe* replicated its division in *Lopez*. The Chief Justice wrote for the Court in *Seminole Tribe*, as he did in *Lopez*, and was joined by Justices O’Connor, Scalia, Kennedy and Thomas. Dissenting in *Seminole Tribe* were Justices Stevens, Souter, Ginsburg and Breyer. The dissenting opinions were by Justices Stevens and Souter. Justice Souter’s demonstration—all ninety-one pages of it—that “neither text, precedent, nor history supports the majority’s abdication of our responsibility to exercise the jurisdiction entrusted to us in Article III,”³⁰ may properly be characterized, in today’s jurisprudentially correct terminology, as awesome.

Thus, as we are about to celebrate the sixtieth anniversary of the “Switch In Time,” we find that the Court, this year and last, has in *Seminole Tribe* limited Congress’s remedial capacity to regulate commerce, and may, pursuant to *Lopez*, be bent on actually narrowing the scope of such regulation.

³⁰ *Id.* at 1185 (Souter, J., dissenting).

V.

In discussing *Lopez* and *Seminole Tribe* I have sought to raise the question whether the current five-Justice majority is risking repetition of the errors made by the Court, in which Roberts played a leading role, in the Commerce Clause cases of 1935 and 1936. I will now discuss another problem area—one that I regard as of greater consequence—in which Roberts erred and the current majority is courting serious trouble.

A. *From Nixon v. Herndon to Smith v. Allwright*

I want to tell a story that reached a climax in 1936 and a second climax in 1944. But the story begins in 1924. In that year Dr. A.L. Nixon, an El Paso physician, appeared at a polling place to vote in the Democratic primary. The election officials declined to let him vote, for the reason that a Texas statute provided that "in no event shall a negro be eligible to participate in a Democratic party primary election held in the State of Texas."³¹ Relying on the Fourteenth and Fifteenth Amendments, Dr. Nixon sued the election officials for damages in a Texas federal district court. The district court dismissed the complaint. Speaking through Holmes, the unanimous Supreme Court reversed. In a three-paragraph opinion entitled *Nixon v. Herndon*,³² Holmes held that the Texas statute contravened the Equal Protection Clause of the Fourteenth Amendment.³³

In the 1928 Democratic primary Dr. Nixon was again turned away from the polls. This time the rule excluding blacks had been formulated by the Texas Democratic Party's Executive Committee, but the Committee acted on the basis of a new Texas statute, enacted after the decision in *Nixon v. Herndon*, that conferred on each political party's state executive committee the authority to decide on party membership and participation. Again Dr. Nixon sued. Again Dr. Nixon's suit was dismissed, and the dismissal was affirmed by the court of appeals. Again the Supreme Court reversed. This time—in *Nixon v. Condon*,³⁴ decided in 1932—the Court spoke through Hol-

³¹ *Nixon v. Herndon*, 273 U.S. 536, 540 (1927).

³² 273 U.S. 536 (1927).

³³ "States may do a good deal of classifying that it is difficult to believe rational, but there are limits, and it is too clear for extended argument that color cannot be made the basis of a statutory classification affecting the right set up in this case." *Id.* at 541.

³⁴ 286 U.S. 73 (1932). *Nixon v. Condon* was first argued on January 7, 1932. On January 12, Holmes retired. See 284 U.S. III (1932). On February 15, Cardozo was

mes's successor, Cardozo: "Delegates of the State's power have discharged their official functions in such a way as to discriminate invidiously between white citizens and black."³⁵ Speaking through McReynolds, the Four Horsemen dissented.

Three weeks after *Nixon v. Condon* was decided, the Texas Democratic Party adopted a resolution limiting party membership and participation to "white citizens."³⁶ A third round of litigation ensued, but this time Dr. Nixon was no longer the plaintiff. And this time, in 1935, in *Grove v. Townsend*,³⁷ the Court rejected the constitutional claim. The new exclusion was found to be constitutionally unobjectionable because Texas had neither made the rule itself nor selected the entity authorized to fashion the rule. The Court treated the rule as a species of private ordering to which the strictures of the Fourteenth and Fifteenth Amendments, addressed to state action, did not attach. The author of the opinion was Roberts.

The opinion in *Grove v. Townsend* was announced on April 1, 1935. It was unanimous: Since even the liberal Justices joined Roberts's opinion for the Court, one had to look beyond the pages of the *U.S. Reports* for a dissenting opinion. But a dissenting opinion was not long in coming. The May 1 issue of *The Nation* contained an editorial entitled "Black Justice." The editorial minced no words:

The opinion of Justice Roberts is singularly unconvincing. It lies in a rarefied atmosphere of dialectic far removed from political actuality. It seems irrelevant to the court . . . that the primary has usurped the place of the election, and that exclusion from the primary robs the Negro of his suffrage. The court's argument is that the prohibitions of the Constitution are upon the state, and a political party is a voluntary association. In short, Justice Roberts detaches the primary from the election, makes the party in charge an exclusive club—and, off to such an ipse dixit start, the conclusion comes easy.

It is hard to magnify the tragedy of the decision.³⁸

nominated to succeed Holmes, and, on February 24, the Senate confirmed the nomination; Cardozo was sworn in and was seated on March 14. See 285 U.S. III (1932). *Nixon v. Condon* was reargued on March 15 and decided on May 2. There cannot have been many instances in the Court's history in which a Justice has been assigned the opinion-writing responsibility in a case of substantial importance and evident difficulty (four Justices dissented) argued on the Justice's second day on the bench.

³⁵ *Condon*, 286 U.S. at 89.

³⁶ *Grove v. Townsend*, 295 U.S. 45, 47 (1935).

³⁷ 295 U.S. 45 (1935).

³⁸ *Black Justice*, 140 NATION 497, 497 (1935).

Professor Friedman notes in his article, *supra* note 7, at 1914 n.106, that some critics of *Grove v. Townsend*—including *The Nation*, in the editorial excerpted in the text—

In 1941, six years after *Grovey v. Townsend*, in *United States v. Classic*,³⁹ a federal criminal prosecution for altering and miscounting ballots cast in a 1940 Louisiana primary to select a Democratic congressional candidate, the Court recognized that subverting such a primary is, "as a matter of law and in fact, an interference with the effective choice of the voters at the only stage of the election procedure when their choice is of significance."⁴⁰ In 1944, the Court, in *Smith v. Allwright*,⁴¹ reexamined *Grovey v. Townsend*. Of the members of the *Grovey v. Townsend* Court, only Stone and Roberts remained. In *Smith v. Allwright* two lawyers named William Hastie and Thurgood Marshall persuaded the Court that *Grovey v. Townsend*, reconsidered in the light of *Classic*, had to be overruled.⁴²

Roberts was the lone dissenter. His unhappiness with what he perceived as a pattern of casual disregard for precedent, of which *Smith* was only the most recent instance, was the catalyst for a sentence which may be Roberts's most celebrated verbal legacy: "The reason for my concern is that the instant decision, overruling that an-

deemed *Grovey v. Townsend* far more of a defeat for civil rights than they deemed the Court's decisions in the second round of the *Scottsboro* cases a victory. *Scottsboro II*, decided on the same day as *Grovey v. Townsend*, consisted of *Norris v. Alabama*, 294 U.S. 587 (1935) and *Patterson v. Alabama*, 294 U.S. 600 (1935). *Norris* and *Patterson* were sequels to *Powell v. Alabama (Scottsboro I)*, 287 U.S. 45 (1932). In *Powell*, the Court had set aside the rape convictions and death sentences of seven of the (originally nine) "Scottsboro Boys"; the state's failure to ensure that the youthful black defendants received adequate representation by competent counsel was held to contravene due process. Subsequent to the decision in *Powell*, two of the *Scottsboro* defendants—Clarence Norris and Haywood Patterson—were again tried, convicted and sentenced to death, and once again the convictions were upheld by Alabama's highest court. In *Norris*, the Court, speaking through Chief Justice Hughes, found systematic exclusion of blacks from the jury rolls from which were drawn the grand jury that had indicted all the defendants and the petit jury that had tried Norris; accordingly, Norris's conviction was reversed. *Patterson* presented identical issues of jury discrimination, but Patterson's conviction was vacated rather than reversed, and the case remanded to the Alabama Supreme Court, so that the latter court could determine whether its affirmation of Patterson's conviction rested on a state ground that involved no federal question and hence was not subject to review by the United States Supreme Court. Viewing the matter in the hindsight of over sixty years, I do not agree that *Grovey v. Townsend* was wronger than *Scottsboro II* was right, but I do not find it surprising that some Court-watchers so concluded in 1935.

³⁹ 313 U.S. 299 (1941).

⁴⁰ *Id.* at 314.

⁴¹ 321 U.S. 649 (1944).

⁴² Said the Court:

This grant to the people of the opportunity for choice is not to be nullified by a State through casting its electoral process in a form which permits a private organization to practice racial discrimination in the election. Constitutional rights would be of little value if they could be thus indirectly denied.

Id. at 664.

nounced about nine years ago, tends to bring adjudications of this tribunal into the same class as a restricted railroad ticket, good for this day and train only."⁴³

B. *From Smith v. Allwright to Shaw v. Reno and Beyond*

Smith v. Allwright opened up the possibility that blacks could vote in the South. But that possibility was not to be realized in any comprehensive fashion for another quarter century. The land mines of the poll tax, of corruptly administered literacy tests, and of outright intimidation blocked the path. But then came Martin Luther King; and the several civil rights initiatives ultimately coalescing in the Southern Regional Council's Voter Education Project; and the Selma-to-Montgomery march; and Lyndon Johnson and the Voting Rights Act of 1965. Blacks began to register to vote in significant numbers. But throughout the South—and, indeed, in the North as well—relatively few blacks have achieved major elective office. A principal reason for this is that white voters, in general, do not vote for black candidates, so black voting strength has not been matched by black representation in state legislatures or in Congress. Against that background, the Justice Department, in administering the Voting Rights Act in areas in which blacks have historically voted in small numbers, has pushed the state legislatures, when engaged in periodic redrawing of state legislative and congressional district lines, to create a few districts in which blacks constitute a voting majority sufficient to provide a realistic opportunity for the election of black candidates.

These Justice Department efforts have spawned a series of cases in which the Court has addressed the question of whether it is unconstitutional to draw legislative district lines with the advertent purpose of creating what are called "majority-minority" districts. The first case posing the issue—*United Jewish Organizations of Williamsburgh v. Carey*⁴⁴ (a case name whose polysyllabic magnificence I will collapse into

⁴³ *Id.* at 669. Although I am critical of *Grove v. Townsend*, and regret that Roberts was unable, when *Smith v. Allwright* came to the Court, to recognize that the time had come to jettison the earlier ruling, I do not mean to suggest that Roberts was as a general matter unsympathetic to civil liberties claims. Roberts wrote for the Court, sustaining such claims, in *Herdon v. Lowry*, 301 U.S. 242 (1937) (freedom of speech), *Hague v. CIO*, 307 U.S. 496 (1939) (public assembly) and *Cantwell v. Connecticut*, 310 U.S. 296 (1940) (freedom of religion). On the other hand, Roberts also wrote for the Court in *Betts v. Brady*, 316 U.S. 455 (1942), the retrograde right-to-counsel case which diluted due process of law for over twenty years until overturned by *Gideon v. Wainwright*, 372 U.S. 335 (1963).

⁴⁴ 430 U.S. 144 (1977).

UJO)—involved the redrawing of state legislative districts in Brooklyn in the mid-seventies. The Court found no constitutional impediment. The Court acknowledged “that New York deliberately increased the nonwhite majorities in certain districts in order to enhance the opportunity for election of nonwhite representatives from those districts.”⁴⁵ But the Court went on to find that

the plan did not minimize or unfairly cancel out white voting strength [T]he plan left white majorities in approximately 70% of the assembly and senate districts in Kings County [Brooklyn], which had a countywide population that was 65% white. Thus, even if voting in the county occurred strictly according to race, whites would not be under-represented relative to their share of the population.⁴⁶

But in this decade, the Court has taken a very different view. Starting in 1993, in *Shaw v. Reno*,⁴⁷ and continuing through a series of cases decided last year⁴⁸ and this year,⁴⁹ the Court has held that for race to be the dominant factor of the numerous factors employed in drawing district lines is unconstitutional unless the state can demonstrate a “compelling interest” in achieving the desired results—a demonstration that none of the states in the cases the Court has ruled on has been able to make to the Court’s satisfaction. *UJO*—the Brooklyn case—has not been expressly overruled, but it has been distinguished into oblivion.

In the cases, starting with *Shaw v. Reno*, that have departed from *UJO*, the Court has divided five-to-four. The division replicates the five-to-four division in *Lopez* and *Seminole Tribe*.⁵⁰ In my respectful

⁴⁵ *Id.* at 165.

⁴⁶ *Id.* at 165-66. The sentences quoted in the text are from Part IV of Justice White’s opinion—a part of the opinion that was joined by Justices Rehnquist and Stevens. Justice Stewart, in a concurring opinion in which Justice Powell joined, made much the same point. See *id.* at 179-80 (Stewart, J., concurring). Part III of Justice White’s opinion reached the same result via an alternate pathway—namely, that New York merely “accede[d] to a position taken by the Attorney General that was authorized by our constitutionally permissible construction of § 5 [of the Voting Rights Act].” *Id.* at 164. Part III was joined by Justice Stevens and, in a concurring opinion, by Justice Brennan, with whom Justice Blackmun agreed. Justices Stewart and Powell found it unnecessary to examine “whether the position of the Department of Justice in this case was required or even authorized by the Voting Rights Act.” *Id.* at 180 n.*. Chief Justice Burger dissented. Justice Marshall did not participate in the decision.

⁴⁷ 509 U.S. 630 (1993).

⁴⁸ See *Miller v. Johnson*, 115 S. Ct. 2475 (1995); cf. *United States v. Hays*, 115 S. Ct. 2431 (1995).

⁴⁹ See *Bush v. Vera*, 116 S. Ct. 1941 (1996); *Shaw v. Hunt*, 116 S. Ct. 1894 (1996).

⁵⁰ In *Shaw v. Reno* the dissenters were Justices White, Blackmun, Stevens and Souter. By the time the subsequent cases that I have referred to reached the Court,

view, the dissenters have the better part of the argument. I recognize, of course, that there may be prudential arguments against drawing district lines with an eye to their racial composition. Concentrating minority voters in one legislative district may yield the election of a minority member of Congress or the state legislature but at the expense of any significant minority political clout in adjacent legislative districts whose representatives may feel free to ignore the interests of their minority constituents. Recognizing this risk, I am inclined, as a prudential matter, to see it as more important, at least in the short run, to provide some assurance of the electability, at least to Congress, of some blacks or Hispanics in states where, prior to the challenged redistrictings, few or none had been elected to Congress or the state legislatures since the turn of the century or earlier—as was true, for example, in North Carolina and Georgia, whose congressional redistrictings the Court vetoed. But my argument is not a point of policy, it is a point of law: The text and history of the Fourteenth and Fifteenth Amendments do not mandate the result arrived at in *Shaw v. Reno* and the later cases. To construe the Constitution as the five Justices have done is to narrow political options in such a way as to bar potentially fruitful experiments, and to do so in a way that is out of harmony with practices of long standing. Justice Ginsburg's dissent in the Georgia case, *Miller v. Johnson*,⁵¹ makes this clear:

Until now, no constitutional infirmity has been seen in districting Irish or Italian voters together, for example, so long as the delineation does not abandon familiar apportionment practices. If Chinese-Americans and Russian-Americans may seek and secure group recognition in the delineation of voting districts, then African-Americans should not be dissimilarly treated. Otherwise, in the name of equal protection, we would shut out "the very minority group whose history in the United States gave birth to the Equal Protection Clause."⁵²

In arguing that the Court was closer to the mark in *UJO* than it is today I am, however, operating under some constraint. The constraint arises from the fact that once upon a time I was a law teacher and would, occasionally, wander into court, pretending I was a real lawyer. Back in 1976, when *UJO* came to the Court, it was my privilege to be, along with others, counsel to the NAACP, an intervenor supporting the contention of New York's Governor Carey that the Brook-

Justices White and Blackmun had retired and had been succeeded by Justices Ginsburg and Breyer; the new Justices took their predecessors' places in dissent.

⁵¹ 115 S. Ct. 2475 (1995).

⁵² *Id.* at 2506 (Ginsburg, J., dissenting) (citation omitted) (quoting *Shaw v. Reno*, 509 U.S. at 679 (Stevens, J., dissenting)).

lyn redistricting plan was constitutional. Since, in my quasi-lawyer capacity, I argued that proposition to the Court twenty years ago, you may reasonably doubt that I am objective today. So I will refrain from burdening you with my 1976 rhetoric—compelling as it was. I will content myself with presenting two snippets of argument in *UJO* in which I played no part.

First, a colloquy between the Court and the extraordinarily able lawyer who represented the plaintiff United Jewish Organizations of Williamsburgh, Nathan Lewin:

THE COURT: Well, suppose the legislature districts expressly and explicitly for the purpose of maximizing the number of Republican districts or the maximum number of Democratic districts, in order to, as they say, approach by districting as near as possible proportional representation?

MR. LEWIN: That, this court has sustained it in *Gaffney* [*Gaffney v. Cummings*, 412 U.S. 735 (1973)], and we certainly don't challenge it.

THE COURT: But expressly they draw the lines on a—

MR. LEWIN: Expressly, yes. We think politics is part of the political process. Race is not part of the political process. Race is an impermissible standard, except when it is being used—it can be struck down when it's being used to reduce the voting effectiveness of voters.⁵³

Second, an excerpt from the responsive argument of the equally able lawyer who in *UJO* argued for the United States in support of the Brooklyn redistricting—the Solicitor General, Robert Bork:

And I was astounded when Mr. Lewin said that race is not a part of our political process. Race has been *the* political issue in this nation since it was founded. And we may regret that that is a political reality, but it is a reality. That's what the Fifteenth Amendment is about, what the Civil War was about. It's what the Constitution was in part about, and it is a subject we struggle with politically today.⁵⁴

VI.

In my remarks today I have spoken critically of some of the work-product of Justice Roberts. And I have also spoken critically of some

⁵³ 92 LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES: CONSTITUTIONAL LAW 829 (Philip B. Kurland & Gerhard Casper eds., 1978).

⁵⁴ Record at 62, *UJO* (No. 75-104) (on file with the *University of Pennsylvania Law Review*).

of the collective work-product of five current Justices who, on important constitutional issues, vote together with marked frequency.⁵⁵ What is it that connects my criticism of Roberts and my criticism of the current five-Justice majority? The connection is this: Sixty years ago Roberts and the Four Horsemen—and, in *Grovey v. Townsend*, the entire Court—looked at an America that was not a real America, but a Potemkin America whose ills could be cured by a Potemkin constitution. And my concern is that in similar fashion today's five-Justice majority has, in the decisions I have discussed, engaged in scrutiny—strict or otherwise—of the issues before them through a flawed constitutional prism, one that has blurred many of the harsh outlines of our beloved and beleaguered country.

My concern about *Lopez* and *Seminole Tribe* is in fact quite limited. I expect *Lopez* to turn out to be an isolated phenomenon—essentially an allergic reaction to a badly drawn and unnecessary statute (unnecessary because state laws, state prosecutors and state courts are fully competent to handle the problem of guns in schools). And I expect *Seminole Tribe* to turn out to be more molehill than mountain—a modest procedural obstacle that Congress can with a little imagination effectively circumvent.⁵⁶ The redistricting decisions seem to me far more troublesome. With respect, and with regret, I submit that these decisions—together with kindred pronouncements of the same five-Justice majority in the realm of affirmative action⁵⁷—appear to take as their predicate a vision of American racial problems which is two-dimensional. To say, as the Court said in *Shaw v. Reno*, that a reapportionment plan in which race is a defining ingredient “bears an uncomfortable resemblance to political apartheid,”⁵⁸ is to suggest

⁵⁵ See Pollak, *Perspectives on a Divided Court*, *supra* note 27, at 305. There are, of course, significant exceptions. For example, Justice Kennedy (who wrote the opinion) and Justice O'Connor joined Justices Stevens, Souter, Ginsburg and Breyer in invalidating the Colorado constitutional provision prohibiting governmental action protecting homosexuals from discrimination. See *Romer v. Evans*, 116 S. Ct. 1620 (1996). And Justice Kennedy joined Justices Stevens, Souter, Ginsburg and Breyer in invalidating the Arkansas constitutional provision setting term limits for Arkansas's United States senators and representatives. See *United States Term Limits v. Thornton*, 115 S. Ct. 1842 (1995).

⁵⁶ Where the issues involved in implementing the commerce power are of a sort perceived by Congress to be of real importance, Congress can presumably authorize federal agencies to initiate federal court litigation, on behalf of the United States as plaintiff, against a state. Nothing in *Seminole Tribe* impairs the authority of the United States to sue a state in a federal court.

⁵⁷ See *Adarand Constructors v. Peña*, 115 S. Ct. 2098 (1995); cf. *Missouri v. Jenkins*, 115 S. Ct. 2038 (1995).

⁵⁸ 509 U.S. 630, 647 (1993).

that the use of race as an instrument to combat racial discrimination is fungible with the use of race to degrade. In this year which is the centennial of *Plessy v. Ferguson*,⁵⁹ the doomsday decision in which the Court equated "separate but equal" with "the equal protection of the laws," we must be particularly wary of slogans that masquerade as constitutional principle, lest we tie our hands in ways that could be calamitous.⁶⁰

⁵⁹ 163 U.S. 537 (1896).

⁶⁰ The ramifying and deleterious impact of the Court's current affirmative action jurisprudence is illustrated by the opinion handed down last year by a panel of the Fifth Circuit invalidating the admissions system of the University of Texas Law School. See *Hopwood v. Texas*, 78 F.3d 932 (5th Cir. 1996). The opinion did not limit itself to addressing the (manifest) flaws in that particular program; the opinion took a far broader view, announcing, *inter alia*, that the opinion of Justice Powell in *Regents of the Univ. of Calif. v. Bakke*, 438 U.S. 265 (1978), should now be ignored:

We agree with the plaintiffs that any consideration of race or ethnicity by the law school for the purpose of achieving a diverse student body is not a compelling interest under the Fourteenth Amendment. Justice Powell's argument in *Bakke* garnered only his own vote and has never represented the view of a majority of the Court in *Bakke* or any other case. Moreover, subsequent Supreme Court decisions regarding education state that non-remedial state interests will never justify racial classifications. Finally, the classification of persons on the basis of race for the purpose of diversity frustrates, rather than facilitates, the goals of equal protection.

Hopwood, 78 F.3d at 944.

One member of the *Hopwood* panel concurred in the judgment but did not join the broad-ranging opinion.

The Supreme Court denied certiorari in *Texas v. Hopwood*, 116 S. Ct. 2581 (1996). Justice Ginsburg, joined by Justice Souter, filed a brief opinion with respect to the denial of certiorari:

Whether it is constitutional for a public college or graduate school to use race or national origin as a factor in its admissions process is an issue of great national importance. The petition before us, however, does not challenge the lower courts' judgments that the particular admissions procedure used by the University of Texas Law School in 1992 was unconstitutional. Acknowledging that the 1992 admissions program "has long since been discontinued and will not be reinstated," the petitioners do not defend that program in this Court. Instead, petitioners challenge the *rationale* relied on by the Court of Appeals. "[T]his Court," however, "reviews judgments, not opinions." Accordingly, we must await a final judgment on a program genuinely in controversy before addressing the important question raised in this petition.

Id. at 2581-82 (citations omitted).

A recent article in the *New York Times* reports (1) a substantial drop in black and Hispanic applications to the University of Texas since *Hopwood* was decided and (2) a cognate, albeit less precipitous, drop in black, Hispanic and Native American applications to California's state university system since the Board of Regents decreed an end to affirmative-action admissions programs. See Peter Applebome, *Universities Report Less Minority Interest After Action to Ban Preferences*, N.Y. TIMES, Mar. 19, 1997, at B12.

* * * * *

For almost sixty years Owen Roberts has been pilloried for the "Switch In Time." I think that one who criticizes him—as I do—for the decisions leading up to the "Switch" ought to acknowledge that the Justice deserves praise for having had the gumption to change his mind. Roberts was an honest man. He was honest with himself: "I have no illusions about my judicial career. But one can only do what one can. Who am I to revile the good God that he did not make me a Marshall, a Taney, a Bradley, a Holmes, a Brandeis or a Cardozo."⁶¹ Roberts fell short of distinction as a member of the Court that has principal custody of the Constitution because he had too limited a perception of the Court's constitutional role. In the *Butler* case, in the opinion striking down the first Agricultural Adjustment Act, Roberts wrote that when a statute is challenged as unconstitutional, "the judicial branch . . . has only one duty,—to lay the article of the Constitution which is invoked beside the statute which is challenged and to decide whether the latter squares with the former."⁶² But Roberts's honesty led him, on occasion, to see more clearly—and hence to judge better—than colleagues of greater sophistication. In *Korematsu v. United States*,⁶³ in 1944, the Court upheld the wartime detention of American citizens of Japanese ancestry. The six-Justice majority was led by Black and Frankfurter, the two Justices—so often in disagreement with each other—conventionally (and properly) regarded as the best and the brightest of that era. In that most significant judicial failure since *Plessy*, the *Korematsu* majority managed to avoid fulfilling their duty to assure that liberty and equality and due process of law are paramount values in war as well as in peace. Roberts was one of the three Justices who dissented.⁶⁴

Roberts was right in *Korematsu* because he had both the gumption and the clarity of vision to look at the actual problem before the Court in three dimensions. Had he seen as clearly earlier in his career he would have fared better. In *Butler* he would not have written—or at least would not have preserved after the first draft—his description of the process of judicial review. I would like to think he

⁶¹ Frankfurter, *supra* note 7, at 312 (quoting Roberts, unattributed quotation).

⁶² *United States v. Butler*, 297 U.S. 1, 62 (1936).

⁶³ 323 U.S. 214 (1944).

⁶⁴ The other dissenters were Justices Murphy and Jackson. The pioneering, contemporaneous, comprehensive, devastating—and superb—critique of *Korematsu* and related cases is Eugene V. Rostow, *The Japanese American Cases—A Disaster*, 54 YALE L.J. 489 (1945).

would have gone back and read what Holmes had written about judicial review a number of years earlier, and Holmes's words might even have led Roberts to a different result. In any event it would be a good thing if Holmes's words were thought about by today's Justices—not just the five whose decisions I have criticized, but all of the nine:

[W]hen we are dealing with words that also are a constituent act, like the Constitution of the United States, we must realize that they have called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters. It was enough for them to realize or to hope that they had created an organism; it has taken a century and has cost their successors much sweat and blood to prove that they created a nation. The case before us must be considered in the light of our whole experience⁶⁵

I have come to the end of my cautionary tale.

⁶⁵ *Missouri v. Holland*, 252 U.S. 416, 433 (1920).